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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

CS Docket No. 99-363

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF
FISHER BROADCASTING INC.**

Fisher Broadcasting Inc. ("Fisher"), by its attorneys, hereby submits these reply comments in response to comments submitted by numerous parties with respect to the Commission's *Notice of Proposed Rule Making* ("Notice"), FCC 99-406, released December 22, 1999, in the above-captioned proceeding.

Fisher operates thirteen television stations in markets as diverse as Seattle, Washington (KOMO-TV, Channel 4, ABC), Augusta, Georgia (WFXG, Channel 54, Fox) and Idaho Falls, Idaho (KIDK, Channel 3, CBS). Since adoption of the Cable Act, it has had extensive experience in the negotiation of retransmission consent agreements. In not a single case has Fisher been unable to reach an agreement permitting retransmission of the signal of its station on terms acceptable to both Fisher and to the cable television system with which it negotiated. The signal of its Seattle station, KOMO-TV, was one of the signals distributed by Prime Time 24 both to C Band and DirecTV viewers seeking a West Coast feed of the ABC Television Network. Fisher has been in negotiations for several months with one of the national DBS

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licensees for consent to the “local-into-local” retransmission of its Seattle and Portland, Oregon (KATU, Channel 2, ABC) stations. Thus Fisher is well qualified to comment on the issues at hand.

The *Notice* requests comment on the “good faith” negotiation and “exclusive” carriage provisions of the Satellite Home Viewer Improvement Act¹ (“SHVIA”). Fisher is interested in this proceeding because it will have an impact on future negotiations not only with satellite carriers, but with all multichannel video program distributors (“MVPDs”), including cable and wireless. Fisher has carefully reviewed the initial comments of all parties in this proceeding. Fisher agrees generally with the Joint Comments of the ABC, CBS, FOX, AND NBC Television Network Affiliate Associations (“Joint Comments”), and supports their adoption by the Commission.

Congress has ordered the Commission to revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent, stating that the Commission shall:

until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.²

¹ Pub. L. No. 106-113, 1000(a)(9), 113 Stat. 1501 (1999) (enacting S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, of which Title I is the Satellite Home Viewer Improvement Act of 1999).

² 47 U.S.C., 325(b)(3)(C)(ii).

This does not give the Commission authority to promulgate an intrusive regulatory scheme to define “good faith.” As shown by Fisher’s own experiences, there is no history of bad faith in retransmission consent negotiations between television broadcast stations and MVPDs. There is no public interest benefit to be gained from prospectively interceding in free market transactions such as these. Proverbially, “if it ain’t broke, don’t fix it.” Moreover, as is amply demonstrated in the Joint Comments, SHVIA does not grant such authority to the Commission, much less mandate such an approach.

The *Notice* suggests that the Commission should follow labor law principles and the rules related to local telephone competition to define “good faith” in the context of retransmission consent negotiations. Fisher disagrees. Retransmission consent negotiations between television stations and MVPDs exist in a wholly different context than labor negotiations or negotiations between incumbent local exchange carriers (“ILECs”) and competing local exchange companies (“CLECs”). In a retransmission consent negotiation, both sides are interested in the goal of carriage. Indeed, Fisher is not aware of a single case in which retransmission consent was not eventually achieved, although agreement may not have come as fast as some might have hoped in a few cases. In contrast, employers may hope that unions will lose representation rights if they stall long enough, and ILECs surely have no economic incentive to help a CLEC. Thus, prospective regulation of “good faith” serves a real purpose in those contexts. It serves none in the context of retransmission consent negotiations.

The Commission suggests that it establish a list of *per se* violations to deter bad faith negotiations by broadcasters. Fisher opposes such an approach. First, Fisher notes that, in order for

one side to be found to be acting in “bad faith,” it is inherently necessary to find the other party to be acting in “good faith.” Yet neither the Commission nor any of the MVPD entities suggest a list of MVPD actions that might constitute “bad faith” or permit a broadcaster to withdraw from negotiations. Indeed both labor law and the rules regulating local telephone competition negotiations contemplate a balanced approach in which both sides must participate in “good faith.”

Perhaps this is best exemplified by the grotesquely one-sided approach advocated by DirecTV, Echostar, and the other MVPDs. Among other things, they would prohibit, as *per se* violations of the “good faith” negotiation requirement, broadcasters even **asking** for any of the following during retransmission consent negotiations:

- Money (Echostar Comments, pp. 13-17)
- Channel Positioning (Echostar Comments, p. 13; DirecTV Comments, p. 10)
- Short Term Agreements (Echostar Comments, p. 13)
- Network Exclusivity Within a Station’s Own Market (Echostar Comments, p. 12; DirecTV Comments, p. 10)
- Carriage of a Digital Signal (Echostar Comments, p. 12, DirecTV Comments, p. 10)
- Carriage of Commonly Owned Stations in the Same or a Different Market (Echostar Comments, p. 12; DirecTV Comments, p. 9)

The obvious question is: If a broadcaster can’t ask for these things in consideration for granting its retransmission consent, **what can it ask for?** To the MVPD, the answer is: nothing. The MVPD strategy is clear. It wants the FCC to impose what it could not obtain from Congress, a scheme under which broadcasters are required to grant retransmission consent upon request,

and for which they can obtain nothing in return. It is not a retransmission consent scheme, it is a must carry scheme stood on its head, in which the MVPD can carry what it wants, but the broadcaster cannot require carriage. The Commission must see through this unfair and one-sided proposal and reject the call for a laundry list of “*per se* violations” as urged by the MVPD industry.³

The proposed “*per se* violations” listed above are, in fact, exactly the kind of competitive marketplace considerations that are presently negotiated on a regular basis between television stations and MVPDs. It would be contrary to the public interest, and an undue diminution of the copyrights of television licensees, for the Commission to create the imbalanced bargaining rights requested by the MVPD industry, and as suggested in the *Notice*.

The Commission should abandon its attempt to prospectively define the limits of “good faith.” It should recognize that the purpose of the requirement is to bring parties to the bargaining table. All that should be required is that the parties be available to meet at reasonable times and places and confer on the terms of an agreement. Indeed, it has been Fisher’s experience that few retransmission negotiations even involve face-to-face negotiations. Usually they involve correspondence, whether electronic or on paper, and telephone and facsimile communications. Thus, even those *per se* violations set forth in the context of ILEC/CLEC negotiations do not make practical sense in the context of typical retransmission consent negotiations.

³ The bankruptcy of Echostar’s position in particular is demonstrated by the fact that Congress specifically contemplated that money would be the subject of negotiation when it said that stations could negotiate for different terms and conditions, “including price terms” provided that such different terms and conditions are based upon competitive marketplace considerations. 47 U.S.C. § 325(b)(3)(C).

A number of MVPD entities address the Congressional requirement that the Commission promulgate a regulation that will

until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts⁴

The MVPD entities argue that by using the word “engaging” rather than “entering”, Congress meant to reach beyond contractual exclusivity provisions, and to permit Commission involvement in a whole range of actions engaged in by broadcasters. Fisher strongly disagrees. The plain language of the statute is clear: broadcasters are to be prohibited from engaging in “exclusive **contracts**.” (Emphasis added) All of the discussion of the MVPDs parsing the word “engaging” cannot change this meaning. It prohibits exclusive contractual provisions until January 1, 2006, nothing more or less. It does not permit Commission review or regulation of other activities.

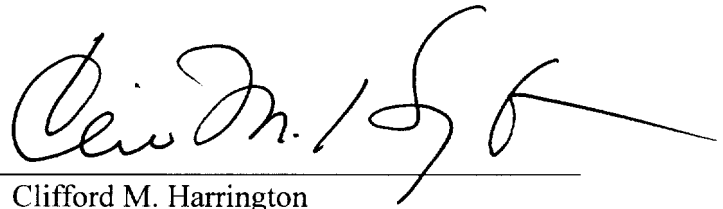
⁴ 47 U.S.C. 325(b)(3)(C)(ii).

Conclusion

The Satellite Home Viewer Improvement Act is designed to promote competition in the video programming delivery market. Inherent throughout the Act's structure is Congress' belief that the free play of the competitive marketplace, with due respect for intellectual property rights, will bring benefits to American consumers. The "good faith" negotiation and "exclusivity" prohibition provisions must be construed narrowly, and not used as a scheme to undercut the retransmission consent rights of broadcasters.

Respectfully submitted,

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